

² The Board notes that following the November 15, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 26, 2002 appellant, then a 38-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment including walking, standing and heavy lifting aggravated his preexisting knee conditions, for which he underwent several surgeries. He noted that he first became aware of his condition and realized its relation to his federal employment in 1994.⁴ OWCP subsequently accepted his claim for aggravation of traumatic arthritis of both knees, including multiple bilateral knee surgical procedures. On October 30, 2009 OWCP expanded its acceptance of the claim to include a torn medial meniscus of the left knee.

On December 4, 2014 appellant requested that his claim be expanded to include a consequential condition of right elbow lateral epicondylitis due to intermittent falls caused by his accepted employment-related knee conditions.

In an October 10, 2014 report, Dr. Andre J. Fontana, a Board-certified orthopedic surgeon, noted that appellant has had multiple falls from his employment-related knee injury, which caused injury to his right elbow. He opined that appellant's lateral epicondylitis was causally related to his employment-related knee conditions. Dr. Fontana indicated in several progress reports that appellant had a history of right lateral epicondylitis.

On March 17, 2015 Dr. H.P. Hogshead, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA) reviewed the medical evidence of record, along with a statement of accepted facts (SOAF). He opined that appellant's right lateral epicondylitis was not causally related to the 1994 employment injury, which occurred 21 years prior.

In a March 20, 2015 development letter, OWCP informed appellant that the evidence of record was insufficient to establish that the acceptance of his claim should be expanded to include consequential right lateral epicondylitis condition. It advised him of the type of additional medical evidence needed to establish the claim. Appellant was afforded 30 days to respond.

In an April 8, 2015 report, Dr. Fontana related that appellant had right lateral epicondylitis which was caused by trauma. He explained that the trauma resulted from a fall which occurred due to his work-related bilateral knee arthritis.

By decision dated April 23, 2015, OWCP denied expansion of the acceptance of the claim to include right lateral epicondylitis.

³ Docket No. 19-0068 (issued August 20, 2019).

⁴ OWCP assigned the present claim OWCP File No. xxxxxx400. Appellant also has a 2007 occupational disease claim under OWCP File No. xxxxxx834, which OWCP accepted for primary osteoarthritis of right lower leg. OWCP has administratively combined File Nos. xxxxxx834 and xxxxxx400, with the latter serving as the master file.

On May 6, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Dr. Fontana reported on January 11, 2016 that appellant had related to him, and the record established, that appellant had fallen on a number of occasions and he therefore used a cane in his right hand. He explained that because appellant had to use the cane in the right hand, this pressure, as well as his falls, had aggravated his lateral epicondylitis of the elbow. Dr. Fontana indicated that this problem has been going on since 2013.

By decision dated February 24, 2016, the hearing representative vacated the April 23, 2015 decision, finding that while DMA Dr. Hogshead had opined that appellant's right lateral epicondylitis could not be causally related to the 1994 employment injury, he failed to provide rationale explaining his opinion. The hearing representative remanded the case for further development of the medical evidence.

On remand OWCP referred the case record, along with a SOAF, to a second DMA, Dr. William Tontz, a Board-certified orthopedic surgeon. In an April 28, 2016 report, Dr. Tontz advised that there was no objective evidence of acute elbow trauma sustained while rehabilitating the knees. He indicated that records from April 8, 2015 disclose no direct acute evidence of trauma other than near falls and reported falls by appellant and there was no evidence of acute trauma to the lateral epicondyle following a fall. Dr. Tontz also related that there was a lack of evidence demonstrating acute tearing or contusion of the lateral epicondyle or extensor complex. Thus, the DMA opined that there was no evidence to support a compensable consequence for lateral epicondylitis.

By *de novo* decision dated May 16, 2016, OWCP denied the claim for a consequential injury, finding that the medical evidence of record was insufficient to establish that the claimed right elbow lateral epicondylitis condition was causally related to or a consequence of the accepted January 1, 1994 injury.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held telephonically on January 17, 2017.

Following the hearing, OWCP received a February 8, 2017 report from Dr. Fontana, who opined that it was medically reasonable that appellant's orthopedic issues regarding the knees caused his multiple falls, thereby forcing appellant to use a cane and injure his right elbow. He indicated that appellant had no preexisting conditions in the elbow and that he had injected appellant on multiple occasions in the lateral part of the elbow after the history of falls.

By decision dated April 4, 2017, the hearing representative affirmed OWCP's May 16, 2016 decision, finding that Dr. Fontana's February 8, 2017 opinion was speculative and lacked supporting objective evidence.

Evidence was received after OWCP's April 4, 2017 decision.⁵

On February 23, 2018 appellant requested reconsideration and submitted additional evidence including several internet articles regarding elbow injuries, which he claimed supported a finding that falling and use of a cane can cause epicondylitis.⁶

On May 3, 2018 appellant again requested reconsideration and submitted additional evidence pertaining to the accepted conditions.

By decision dated July 9, 2018, OWCP denied appellant's request for reconsideration, finding that his May 3, 2018 request was untimely filed and failed to demonstrate clear evidence of error.

On October 11, 2018 appellant filed an appeal with the Board. By order dated August 20, 2019, the Board set aside OWCP's July 9, 2018 decision, finding that appellant's February 23, 2018 request for reconsideration was timely filed.⁷ The Board remanded the case to OWCP to apply the correct standard of review for timely requests for reconsideration.

By decision dated November 15, 2019, OWCP denied modification of its April 4, 2017 decision, finding that the evidence of record was insufficient to establish that appellant's right lateral epicondylitis condition was caused and/or aggravated by his accepted bilateral knee conditions.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁸

To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and

⁵ In an October 13, 2017 report, Dr. Fontana diagnosed sprain of radiocarpal joint of right wrist. A November 28, 2017 right wrist magnetic resonance imaging (MRI) scan report was also received. Other evidence received included surgical reports of the left knee and right knees, MRI scans of the right knee, progress reports from Dr. Fontana regarding appellant's knees and several physical therapy reports for appellant's knees.

⁶ Additional evidence submitted included a March 29, 2017 surgical report of the right knee, and an April 17, 2018 report from Dr. Fontana concerning appellant's knees.

⁷ *Supra* note 3.

⁸ See *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

the accepted employment injury.¹⁰ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹¹

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.¹² Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural consequence of a compensable primary injury.¹³

ANALYSIS

The Board finds that this case is not in posture for a decision.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁴ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁵ As well, OWCP's procedures provide that the reasoning behind its evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁶ OWCP's procedures further provide that "the CE should discuss evidence germane to the issue from the beginning of the development process for the particular benefit at issue. Specific dates and authors of the relevant evidence (medical reports, statements etc.) should be stated."¹⁷

In its November 15, 2019 merit decision, OWCP did not address the relevant evidence received prior to the April 4, 2017 merit decision. The record reflects that pertinent medical evidence pertaining to the consequential right elbow condition began with Dr. Fortuna's October 10, 2014 report. As OWCP only reviewed evidence received after its April 4, 2017 merit decision, it did review all of the medical evidence regarding the underlying issue. Thus, the case will be remanded to OWCP to enable a proper consideration of all the relevant evidence of record at the time of its November 15, 2019 decision.

¹⁰ *D.S.*, Docket No. 20-0146 (issued June 11, 2020); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹¹ *Id.*

¹² *See S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004).

¹³ *A.T.*, Docket No. 18-1717 (issued May 10, 2019); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139 (2001).

¹⁴ 5 U.S.C. § 8124(a).

¹⁵ 20 C.F.R. § 10.126.

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(d) (February 2013).

¹⁷ *Id.*

Accordingly, the Board will set aside the November 15, 2019 decision and remand the case for OWCP to perform a merit review of all the evidence and argument in support of appellant's claim for a consequential right elbow lateral epicondylitis condition and make findings of fact and provide reasons for its decision, pursuant to the standards set forth in section 5 U.S.C. § 8124(a) and 20 C.F.R. § 10.126. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2019 merit decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 17, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board